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No. 90-333

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LAMPF PLEVA LIPKIND PRUPIS & PETIGROW,
PETITIONER

v.

JOHN GILBERTSON, ET AL.,
RESPONDENTS

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS COMDISCO, INC. AND KENNETH N. PONTIKES IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the implied private cause of action under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 is subject to a uniform federal statute of limitations or to divergent limitations periods borrowed from the law of the forum state.

2. If a federal statute of limitations is applicable to 10(b) actions, whether the appropriate statute is the one-year/three-year provision in the Securities Act of 1933 and the Securities Exchange Act of 1934 or the five-year provision in the Insider Trading and Securities Fraud Enforcement Act of 1988.

RULE 29.1 STATEMENT

Comdisco, Inc. and Kenneth N. Pontikes were defendants-appellees below and, pursuant to Sup. Ct. R. 12.4, are respondents in support of petitioner in this Court. Comdisco, Inc. has no parent company. Its non-wholly-owned subsidiaries are: Comdisco Investment Group, Inc.; Comdisco Belgium S.A.; Comdisco France S.A.; Comdisco Italia, S.P.A.; Comdisco Japan, Inc.; Comdisco Portugal Computadores LDA; Comdisco, S.A.; Comdisco Financial Services VmbH; Comdisco Australia PTY Ltd.; Comdisco Espana, S.A.; Comdisco Switzerland, S.A.; Comdisco United Kingdom Limited; and Computer Discount Corporation S.A.-Madrid.

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BRIEF FOR RESPONDENTS COMDISCO, INC. AND KENNETH N. PONTIKES IN SUPPORT OF PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 8a-18a) is unreported. The opinion of the district court (*id.* at 22a-43a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 1990. A timely petition for rehearing was denied on May 16, 1990. The petition for a writ of certiorari was filed on August 10, 1990, and was granted on October 9, 1990. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The appendix to this brief contains the relevant provisions of the Securities Act of 1933, the Securities Exchange Act of 1934, the Insider Trading Sanctions Act of 1984, the Insider Trading and Securities Fraud Enforcement Act of 1988, and SEC Rule 10b-5.

STATEMENT

1. The facts relevant to the statute of limitations question are uncontroverted and may be briefly stated. Plaintiffs were investors in various limited partnerships formed for the purpose of purchasing and leasing computer equipment and software. Plaintiffs, "seeking tax shelters," made their investments between 1979 and 1981. Pet. App. 28a. As the district court stated (*ibid.*):

> Tax problems arose, but plaintiffs did not then attempt to investigate their claims or file this action. When the tax shelters collapsed, plaintiffs paid no heed to their investments but instead sought to resolve their tax problems.

Despite receiving continuing reports on the economic problems of the partnerships (*id.* at 31a-32a), plaintiffs did not commence this litigation until after they had reached a settlement with the Internal Revenue Service concerning the disallowance of their tax benefits. *Ibid.*

In their complaints, plaintiffs alleged that they were induced to make their 1979-1981 investments by defendants' misrepresentations in connection with the offering and sale of the limited partnership interests. Pet. App. 31a, 32a-33a. On that basis, they asserted, *inter alia*, an implied cause of action under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b). Plaintiffs first filed

this litigation in November 1986—more than five years after the last of their investments.[1]

2. Insofar as relevant here, the district court granted defendants' motion for summary judgment on statute of limitations grounds. Pet. App. 22a-43a. Following circuit precedent, the court held that Oregon's two-year statute of limitations for fraud applied to the 10(b) count. *Id.* at 35a. Because plaintiffs were on inquiry notice as early as October 1982 and failed to exercise due diligence to discover the alleged fraud, and because defendants had not fraudulently concealed the alleged violations, the court dismissed plaintiffs' 10(b) claim as barred by the two-year limitations period. *Id.* at 35a-43a.

3. The court of appeals reversed the dismissal of plaintiffs' 10(b) claim. Pet. App. 8a-18a. Like the district court, the court of appeals applied Oregon's fraud statute of limitations (*id.* at 12a). The court of appeals held, however, that plaintiffs had presented disputed issues of material fact on the questions of inquiry notice and fraudulent concealment, thereby rendering summary judgment inappropriate. *Id.* at 15a-17a.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The first issue in this case is whether the implied private cause of action under Section 10(b) of the Securities Exchange Act of 1934 is subject to (1) a uniform statute of limitations drawn from a limitations period provided in the federal securities laws for express statutory

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[1] As defendants Comdisco, Inc. and Kenneth N. Pontikes explained in their memorandum in support of summary judgment (at 27-31), plaintiffs' deliberate delay in bringing suit resulted in substantial prejudice to the defense, including witnesses' loss of memory on key issues, the absence of critical documents, and the death or disappearance of essential witnesses.

causes of action, or (2) divergent state limitations periods borrowed from the law of the forum where the particular suit is filed.[2] Our position, and that of the United States,[3] is that a uniform federal limitations period is appropriate.

This conclusion follows from two central and essentially indisputable propositions. First, with a consensus rare in the law, courts and commentators have agreed that borrowing state limitations periods in federal securities litigation is inherently impractical and undesirable. Borrowing state law has led to uncertainty and unpredictability for parties and judges, greater expense and delay in litigation, and inconsistencies and forum shopping under a statute with liberal venue provisions.

Second, in *every* instance in which Congress has enacted an express private cause of action in the securities laws, it concomitantly has provided an express federal limitations period. These limitations have been carefully designed to guard against vexatious litigation, to promote certainty for plaintiffs and defendants alike, and to ensure national uniformity. Congress plainly would have followed the same course, in furtherance of the same policies, if it had included an explicit 10(b) cause of action in the statute; there is absolutely no basis for the courts to depart from this congressional scheme in formulating the implied 10(b) cause of action. Accordingly, as judges and scholars have long advocated, the most appropriate statute of limitations

[2] SEC injunctive suits to enforce the securities laws are not subject to a statute of limitations. See 5C A. Jacobs, LITIGATION AND PRACTICE UNDER RULE 10b-5, at 10-5 & n.7 (2d ed. 1990); cf. *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 751 n.14 (1975). Such actions are not at issue in this case.

[3] The Solicitor General took this position in response to the Court's invitation to express the views of the United States in *Lebman* v. *Aktiebolaget Electrolux*, cert. denied, 109 S. Ct. 3214 (1989) (No. 88-1114). The SEC also adopted the same position in *Ceres Partners* v. *GEL Associates*, No. 89-7666 (2d Cir. Nov. 8, 1990).

for 10(b) actions is found in the express federal limitations provisions in the securities laws, not in the welter of limitations periods provided by the 50 states for common law fraud, "blue sky law" violations, or other causes of action thought to be "analogous" to 10(b) claims.

2. The only remaining question is which express limitations period in the federal securities laws should be applied to 10(b) actions. It is here that we and the SEC part company. In our view, the appropriate statute of limitations for such implied actions is the statutory one-year/three-year provision applicable to the express private causes of action under the Securities Act of 1933 and the Securities Exchange Act of 1934.[4] This limitations provision reflects Congress's contemporaneous determination of the proper time period for commencing private securities suits and, because of the similarities between Section 10(b) and the express liability sections of the 1933 and 1934 Acts, best effectuates the congressional resolution of the competing policies of repose and private enforcement.

By contrast, the SEC relies on the five-year statute of limitations incorporated in the 1988 insider trading statute. That limitations period should be rejected because (a) it did not appear in the federal securities laws until some 50 years after enactment of the 1934 Act; (b) Congress specifically rejected a five-year period as too long for the express causes of action in the 1933 and 1934 Acts; (c) in enacting the 1988 statute, Congress narrowly limited the five-year limitations provision to the special situation of insider trading and deliberately did not extend it to 10(b) actions generally; and (d) the courts have noted (contrary to the premise of the government's position in *Leb-*

[4] The one-year/three-year limitation provides that suit must be brought within one year after plaintiff's discovery of the alleged violation and in no event more than three years after such violation occurred. See pages 33-34, *infra* (legislative history of provisions).

man and *Ceres Partners*) that the five-year period appears to be a statute of limitations and not, like all of the express time provisions in the 1933 and 1934 Acts, a statute of repose.[5]

In these circumstances, the SEC's submission represents a form of legislative revisionism that is irreconcilable with the history and policies of the statutes Congress enacted. The one-year/three-year provision in the 1933 and 1934 Acts, not the five-year provision created half a century later in the unique context of insider trading violations, thus supplies the appropriate limitations period for implied 10(b) actions. There can be no doubt that this is the period Congress would have chosen if it had enacted an express 10(b) action in 1934; neither the judicial implication of the right of action nor the subsequent insider trading legislation justifies a different limitations period.

ARGUMENT

THE IMPLIED PRIVATE 10(b) CAUSE OF ACTION IS SUBJECT TO A UNIFORM ONE-YEAR/THREE-YEAR FEDERAL LIMITATIONS PERIOD

The decisions of this Court consistently have recognized the critical importance of statutes of limitations to a fair and sound litigation system. The Court has "emphasized" that statutes of limitations "are not simply technicalities" but serve "importan[t] * * * policies" and "have long been respected as fundamental to a well-ordered judicial system." *Board of Regents* v. *Tomanio*, 446 U.S. 478, 487 (1980). "[S]trong policies of repose" prevent dilatory litigation that could "impair the accuracy of the fact-finding

[5] The term "statute of repose" is commonly used to refer to a limitations period that provides an absolute maximum time limit that is not subject to equitable tolling or equitable estoppel. A "statute of limitations," by contrast, is a limitations period that may be extended on such equitable grounds.

process" and "upset settled expectations that a substantive claim will be barred without respect to whether it is meritorious." *Ibid.* Thus, the "customary purpose" of statutes of limitations is

> "to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them."

Bowen v. *City of New York*, 476 U.S. 467, 481 & n.13 (1986) (citations omitted).

Despite the evident importance of statutes of limitations, Congress does not always specify the applicable limitations period for a federal cause of action. When it does not, the Court, recognizing the "importance of policies of repose in the federal * * * system," has "borrowed" the most analogous statute of limitations to bar untimely suits. *Tomanio*, 446 U.S. at 488. To hold otherwise and thereby allow actions to "be brought at any distance of time * * * would," as Chief Justice Marshall explained, "be utterly repugnant to the genius of our laws." *Adams* v. *Woods*, 6 U.S. (2 Cranch) 336, 342 (1805), quoted in *Wilson* v. *Garcia*, 471 U.S. 261, 271 (1985).

In many cases of congressional silence, this Court has turned to state rather than federal law to find the controlling limitations period. Recent decisions make clear, however, that no rule of law mandates that result and that the Court is free to borrow the appropriate statute of limitations from either federal or state law. See *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987); *DelCostello* v. *International Bhd. of Teamsters*, 462 U.S. 151 (1983); see also *Wilson*, 471 U.S. at 270 &

nn.20, 21. Thus, "a clear majority of the Court [has] rejected * * * [the] single path * * * that federal courts always should apply the state statute of limitations most analogous to each individual case whenever a federal statute is silent on the proper limitations period." *Agency Holding*, 483 U.S. at 146. In particular, neither the Rules of Decision Act (28 U.S.C. § 1652)[6] nor the presumed intention of Congress in failing to prescribe an explicit limitations period (especially for a judicially implied rather than a legislatively created cause of action)[7] requires that a state statute of limitations be borrowed.

A state limitations period often will prove to be appropriate, particularly when the dispute is localized in nature. See, *e.g.*, *Reed* v. *United Transp. Union*, 488 U.S. 319 (1989); *Owens* v. *Okure*, 488 U.S. 235 (1989). But in other cases, the most logical limitations period is one borrowed from federal law. The decision whether to choose state or federal law in any given case depends upon a careful analysis of the particular statutory scheme involved, including the language and structure of the act, its legislative history, and its purposes and practical implementation. Under that analysis, a federal rather than a state statute of limitations should be borrowed for 10(b) actions.

I. A UNIFORM LIMITATIONS PERIOD DRAWN FROM THE FEDERAL SECURITIES LAWS IS APPLICABLE TO IMPLIED 10(b) ACTIONS

As the Ninth Circuit did in this case, courts traditionally have borrowed state limitations periods for implied 10(b) actions. This Court has noted that practice but has never

[6] See *Agency Holding*, 483 U.S. at 147; *DelCostello*, 462 U.S. at 159 n.13.

[7] See *Agency Holding*, 483 U.S. at 148; *Wilson*, 471 U.S. at 270 n.20, quoting *Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 709 (1966) (White, J., dissenting); *DelCostello*, 462 U.S. at 159-160 n.13.

been required to pass upon its validity. See *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 384 n.18 (1983); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 210 n.29 (1976).[8]

More recently, based on the intervening decisions of this Court in *Agency Holding*, *Wilson*, and *DelCostello*, three courts of appeals have ruled that the appropriate limitations period in 10(b) suits is to be taken from the federal securities laws rather than from state law. See *Ceres Partners* v. *GEL Associates*, No. 89-7666 (2d Cir. Nov. 8, 1990); *Short* v. *Belleville Shoe Mfg. Co.*, 908 F.2d 1385 (7th Cir. 1990) (Easterbrook, J.), petition for cert. pending, 59 U.S.L.W. 3354 (filed Sept. 26, 1990) (No. 90-526); *In re Data Access Systems Securities Litigation*, 843 F.2d 1537 (3d Cir.) (en banc), cert. denied, 488 U.S. 849 (1988); see also *Davis* v. *Birr, Wilson & Co.*, 839 F.2d 1369, 1370-1376 (9th Cir. 1988) (Aldisert, J., concurring). A number of district courts have indicated their agreement with this view,[9] as have the commentators. See page 15 & note 13, *infra*.

[8] The Solicitor General agrees (*Lebman* Am. Br. 6 n.5) that the Court has never "pass[ed] on the appropriateness of that practice." See also *Ceres Partners* v. *GEL Associates*, No. 89-7666 (2d Cir. Nov. 8, 1990), slip op. 20-21; *Short* v. *Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1387 (7th Cir. 1990), petition for cert. pending, 59 U.S.L.W. 3354 (filed Sept. 26, 1990) (No. 90-526); *In re Data Access Systems Securities Litigation*, 843 F.2d 1537, 1539 (3d Cir.) (en banc), cert. denied, 488 U.S. 849 (1988).

[9] See *Welch* v. *Cadre Capital*, 735 F. Supp. 467, 474, 477, 482 (D. Conn. 1990); *Robertson* v. *Deloitte, Haskins & Sells*, 732 F. Supp. 979, 985 (E.D. Ark. 1990); *Dingler* v. *T.J. Raney & Sons, Inc.*, 708 F. Supp. 1044, 1055 (W.D. Ark. 1989); *Kayne* v. *Paine-Webber Inc.*, 703 F. Supp. 1334, 1343 (N.D. Ill. 1989); *Bernstein* v. *Crazy Eddie, Inc.*, 702 F. Supp. 962, 980-981 (E.D.N.Y. 1988), vacated in part on other grounds, 714 F. Supp. 1285 (1989); *Marchese* v. *Nelson*, 700 F. Supp. 522, 523 (D. Utah 1988); *Bath* v. *Bushkin, Gaims, Gaines & Jonas*, 695 F. Supp. 1156, 1159-1162 (D. Wyo. 1988), aff'd in part & rev'd in part, 913 F.2d 817, 818-819 (10th Cir. 1990) (panel bound by circuit precedent to apply state limitations period). See also *Elysian Fed. Sav.* v. *First Interregional Equity*, 713 F. Supp. 737 (D.N.J. 1989) (following *Data Access*).

These opinions cogently demonstrate the appropriateness of applying a federal limitations period. Indeed, the structure, history, and policies of the federal securities laws present a compelling case for borrowing a federal statute of limitations for the implied 10(b) cause of action. Even without such indicia of congressional intent, moreover, the same conclusion would be required under the Court's decisions in *Agency Holding* and *DelCostello*, which recognize the need for a federal limitations period " 'when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking' " (483 U.S. at 148, quoting 462 U.S. at 171-172). Resort to state limitations periods in 10(b) actions has produced a morass of inconsistency, unpredictability, and inefficiency. Only application of a federal statute of limitations can achieve the necessary certainty and uniformity in this important area and effectuate the policy choices that Congress carefully made in enacting the federal securities laws.

A. Absorption Of State Limitations Periods For 10(b) Actions Has Led To Inconsistency, Unpredictability, And Wasteful Litigation

In borrowing state limitations periods in 10(b) actions, courts were heavily influenced by "historical habit" developed in other areas of law (*Roberts* v. *Magnetic Metals Co.*, 611 F.2d 450, 456 (3d Cir. 1979) (Sloviter, J., concurring)) and acted largely "on auto-pilot, without discussing whether something differentiated securities laws from other statutes." *Short*, 908 F.2d at 1387. "There are, however, no strong policy reasons for borrowing state statutes of limitations with respect to implied claims arising under federal [securities] law." 4 A. Bromberg & L. Lowenfels, SECURITIES FRAUD & COMMODITIES FRAUD § 11.9(300), at

11:205 (1989). This reflexive approach has resulted in "one tottering parapet of a ramshackle edifice" in which "the courts of appeals disagree on every possible question about limitations periods in [10(b)] securities cases." *Norris* v. *Wirtz*, 818 F.2d 1329, 1332 (7th Cir.), cert. denied, 484 U.S. 943 (1987).

The widespread disagreements among the courts were recently cataloged by the American Bar Association Committee on Federal Regulation of Securities. See *Report of the Task Force on Statute of Limitations for Implied Actions*, 41 BUS. LAW. 645 (1986).[10] To begin with, courts disagree on what state law is most analogous to 10(b) actions. Different courts have borrowed the limitations period for common law fraud suits, for violations of the state blue sky law, and even for personal injury litigation. *Id.* at 648, 650-652, 659-666. Several circuits or states have yet to resolve the issue of the applicable limitations period. *Id.* at 646, 659-666. Other courts have established different rules for the various states in the circuit, applying the fraud period for 10(b) actions in one state and the blue sky period for identical suits in another state. *Id.* at 660. And some courts have declined to adopt a controlling rule of law at all, electing instead to decide on a case-by-case basis which state cause of action is most analogous to the 10(b) claim presented in the particular suit. *Id.* at 651-652. As a result, the limitations period applicable to 10(b) actions ranges anywhere from one year to 10 years, and in some circuits is simply indeterminate. *Id.* at 646, 650.

These inconsistencies, serious as they are, do not represent the full extent of the problem. For example, even

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[10] A circuit-by-circuit and state-by-state summary of the law is contained in an appendix to the Report (41 BUS. LAW. at 659-666) and was updated in the Solicitor General's *amicus* brief in this Court in *Lebman*. Bromberg and Lowenfels devote some 100 pages in their treatise to the complexities of statutes of limitations in federal securities cases.

circuits that have adopted a single standard for determining the state statute of limitations to be borrowed (*e.g.*, the statute of limitations for fraud) in fact are forced to apply different limitations periods because of variations in the laws of the respective states; state fraud statutes of limitations range from two to 10 years, while state blue sky laws vary from one to three years. ABA Report at 650. Further complications arise when states have more than one fraud or blue sky limitations period and when they amend their laws (or reinterpret them in judicial decisions) in ways that affect the selection of the most appropriate analogy for 10(b) actions. *Id.* at 652-653; *Short*, 908 F.2d at 1388-1389. Thus, as the Second Circuit recently observed, "there is no uniformity in either the type of state limitations statute from which the federal courts borrow or the periods provided by the states for a given category of action." *Ceres Partners*, slip op. 13.

Other sources of confusion and conflict arise from the "difficult questions [that are presented] concerning whose tolling and estoppel doctrines apply: the state's, the federal court's, or both?" *Short*, 908 F.2d at 1389. Courts generally have followed federal rules for tolling and estoppel, although that approach is open to serious doubt after this Court's decisions in *Tomanio* (446 U.S. at 483-486) and *Johnson* v. *Railway Express Agency* (421 U.S. 454, 463-464 (1975)), which recognize that federal law borrowing a state statute of limitations also incorporates state tolling rules. See *Norris*, 818 F.2d at 1331. What is more, federal courts do not apply the tolling and estoppel rules consistently, disagreeing, for instance, on whether a subjective or objective standard governs the plaintiff's due diligence obligation and the effect of a defendant's active concealment of his fraud. See ABA Report at 654-655.[11]

[11] As the Report also notes (at 655), "[m]ore troubling than the complexity of the tolling issue, however, is the inescapable conclusion that Congress did not intend equitable tolling to apply in actions under the securities laws." This issue is further discussed at pages 33-34, 42-43, *infra*.

The practical consequences of these legal conflicts are both plain and severe. First, neither plaintiffs nor defendants can ascertain their legal rights with any confidence. This is conducive to nothing but uncertainty and unfairness, as plaintiffs unwittingly lose claims they thought they had and defendants are unable to put past events behind them and reliably plan for the future. It also spawns extensive and wasteful litigation to resolve limitations issues wholly collateral to the merits of the underlying dispute. See *Owens* v. *Okure*, 488 U.S. at 239-240, 245-247; *Agency Holding*, 483 U.S. at 150; *Wilson*, 471 U.S. at 275. This "situation is a nightmare" to which "[l]awyers and courts alike devote untold hours." *Short*, 908 F.2d at 1389.[12] Such costs are especially unjustified here, for " '[f]ew areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations.' " *Wilson*, 471 U.S. at 266, quoting *Chardon* v. *Fumero Soto*, 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting).

Furthermore, application of state limitations periods leads to divergent outcomes depending entirely upon the state where plaintiff files suit. Such discrepancies in the rights of the parties are inherently inequitable and cannot be reconciled with the nationwide scope of the country's securities markets and federal securities laws. As the Third Circuit explained in *Data Access* (843 F.2d at 1549):

> The necessity for uniform federal remedies in security cases would seem to demand recourse to a uniform federal statute of limitations. A broker in New York, an issuer in Delaware, a purchaser in San Francisco, an accountant in New Jersey, and a lawyer in Pennsylvania should be subject to the same statute of limitations for actions based on section 10(b) or Rule 10b-5.

[12] In this very case, more than four years—the entire life of the lawsuit—have been devoted to resolving the limitations question.

See also *Ceres Partners*, slip op. 12 ("federal securities regulation is inherently national in scope and in need of uniform rules").

Equally problematic, variation in the applicable limitations period improperly encourages forum shopping by plaintiffs. This is a particular concern under the federal securities laws, which authorize nationwide service of process and contain broad venue provisions that allow suit to be brought in any district where "the defendant is found or is an inhabitant or transacts business" or where the transaction or violation took place. 15 U.S.C. §§ 77v(a), 78aa. See L. Loss, FUNDAMENTALS OF SECURITIES REGULATION 993 (2d ed. 1988). Thus, if state statutes of limitations are followed, plaintiffs will be afforded an undue opportunity to sue whenever the limitations period in a single available jurisdiction has not run, even though the time in all other relevant jurisdictions—including those that have the most substantial connections to the transaction and litigation—has lapsed. This problem is especially acute, and the sound judicial management of litigation especially difficult, in the common situation of nationwide or multi-state class actions. See *Short*, 908 F.2d at 1389.

In sum, as the ABA Report concludes (at 646, 647), the borrowing of state limitations periods in 10(b) suits has created "serious problems" and resulted in a "disarray" that

> serves no public purpose. This uncertainty and lack of uniformity promote forum shopping by plaintiffs and result in wholly unjustified disparities in the rights of the parties litigating identical claims in different states. Neither plaintiffs nor defendants can determine their rights with any certainty. Vast amounts of judicial time and attorneys' fees are wasted. Moreover, managements of publicly held companies, as well as their auditors and attorneys, are frequently unable to assess the impact of possible litigation under rule 10b-5. This deprives investors of information adequate for informed evaluation of such companies' potential liabilities.

Accordingly, "the use of state law has disserved not only the federal courts but litigants, the bar, and the investment community." *Id.* at 656. The current "state of the law * * * [is] chaotic" and "deference to state law is not warranted because federal, not state, interests are involved." *Ibid.*

In the face of this impenetrable thicket, "[l]oud calls for reform issue from scholars and the bar. With a unanimity unmatched in any other corner of securities law, everyone wants a simpler way—and to everyone that means a uniform federal statute of limitations." *Short*, 908 F.2d at 1389. As the ABA Report noted (at 647), the "obvious" way to obtain a uniform statute is "to look to the limitations periods Congress provided for the express private rights of action under the securities laws." Professor Loss has explained the soundness of such an approach:

> [W]ith the 1933 and 1934 Acts so closely related, why not look to *their* statutes of limitations by way of analogy rather than to a variant state law? Would it not be eminently more consistent with the overall statutory scheme to look to what Congress itself did when it was thinking specifically of private actions in securities cases rather than to a grab-bag of more or less analogous state statutes?

Loss, *supra*, at 994-995 (emphasis in original). On this proposal "the commentators seem to be of one view." *Id.* at 996.[13]

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[13] In addition to the SEC and the ABA Federal Securities Regulation Committee, both of which agree that a uniform federal limitations period is appropriate, see also, *e.g.*, A. Bromberg, SECURITIES LAW: SEC RULE 10b-5, § 12.9, at 284 (1967); 4 Bromberg & Lowenfels, *supra*, § 11.9(500); Bateman & Keith, *Statute of Limitations Applicable to Private Actions under SEC Rule 10b-5: Complexity in Need of Reform*, 39 MO. L. REV. 165, 183 (1974); Block &

(Footnote continued on following page)

As we now show, the structure, history, and policies of the federal securities laws, as well as this Court's recent decisions, compel the conclusion that the commentators have universally endorsed: 10(b) actions should be subject to a uniform limitations period drawn from the express limitations periods in the federal securities laws.

[13] *continued*

Barton, *Statute of Limitations in Private Actions Under Section 10(b)—A Proposal for Achieving Uniformity*, 7 SEC. REG. L.J. 374, 381-382 (1980); Bloomenthal, *Statutes of Limitations and the Securities Acts—Part II*, 7 SEC. & FED. CORP. L. REP. 25, 25-26, 30 (Apr. 1985); Fiebach & Doret, *A Quarter Century Later—The Period of Limitations for Rule 10b-5 Damage Actions in Federal Courts Sitting in Pennsylvania*, 25 VILLANOVA L. REV. 851, 879-880 (1979-80); Israels, Book Review, 77 YALE L.J. 1585, 1591-1592 (1968); Kaulbach, *A Functional Approach to Borrowing Limitations Periods for Federal Statutes*, 77 CALIF. L. REV. 133, 135-136, 160, 162-165 (1989); Martin, *Statutes of Limitation in 10b-5 Actions: Which State Statute is Applicable?*, 29 BUS. LAW. 443, 454-458 (1974); Raskin & Enyart, *Which Statute of Limitations in a 10b-5 Action?*, 51 DENVER L.J. 301, 302 (1974); Ruder, *Civil Liability Under Rule 10b-5: Judicial Revision of Legislative Intent?*, 57 NW. L. REV. 627, 649-650, 681 n.43 (1962); Ruder & Cross, *Limitations on Civil Liability under Rule 10b-5*, 1972 DUKE L.J. 1125, 1144, 1148-1150; Schulman, *Statutes of Limitation in 10b-5 Actions: Complication Added to Confusion*, 13 WAYNE L. REV. 635, 638, 643 (1967); Comment, *Securities*, 13 CREIGHTON L. REV. 1436, 1449 (1980); Comment, *A Cry for Help: The Ninth Circuit and the Statute of Limitations in Rule 10b-5 Actions*, 22 U.C.L.A. L. REV. 947, 950-951, 963 (1975); Note, *Obtaining Uniformity for Section 10(b) and Rule 10b-5 Causes of Action*, 22 CONN. L. REV. 525, 526, 534-538, 559-562 (1990); Note, *The Proper Statute of Limitations on a Rule 10b-5 Action*, 23 IND. L. REV. 731, 739-741, 749-751 (1990); Note, *Securities Regulation—Statutes of Limitations*, 19 SETON HALL L. REV. 724, 725, 752-753 (1989); Note, *Securities Litigation—Statutes of Limitations*, 34 VILLANOVA L. REV. 611, 612-613, 626-629 (1989); Note, *Statutes of Limitation for Section 10(b) and Rule 10b-5: A New Proposal for Uniformity*, 46 WASH. & LEE L. REV. 665, 666, 674, 683-687 (1989).

B. The Structure, History, And Policies Of The 1933 And 1934 Acts Demonstrate That A Federal Statute Of Limitations Should Apply To 10(b) Actions

The legislative development of the 1933 and 1934 Acts constitutes direct evidence of Congress's intent and demonstrates that the implied 10(b) cause of action should be subject to a federal statute of limitations drawn from the express limitations periods provided in the federal securities laws. The specifics of this history are most relevant to the question of *which* federal limitations periods should be borrowed for 10(b) actions, and accordingly a detailed discussion is deferred to Section II, *infra*. At this point, three general observations suffice to demonstrate that application of a federal rather than a state limitations period is the only approach consistent with the statutory scheme adopted by Congress. See *Ceres Partners*, slip op. 28-29 ("judicial selection of a uniform nationwide limitations period is what Congress would have intended for private rights of action judicially implied under [the federal securities laws]").

First, the limitations issue in this case must be viewed against the background fact that 10(b) suits involve a *judicially implied* cause of action. See, *e.g.*, *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 477 (1977); *Blue Chip Stamps*, 421 U.S. at 729-730.[14] In that circumstance, congressional silence concerning the applicable statute of limitations does not even arguably suggest an understanding that state limitations periods would be incorporated. Con-

[14] Although the Court has accepted the existence of an implied 10(b) cause of action, recent decisions make it doubtful that an implied action would be recognized if the issue arose for the first time today. See, *e.g.*, *Karahalios* v. *National Fed. of Federal Emp., Local 1263*, 109 S. Ct. 1282, 1286, 1288 (1989); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 578 (1979); *Thompson* v. *Thompson*, 484 U.S. 174, 188 (1988) (O'Connor, J., concurring); *id.* at 190 (Scalia, J., concurring in the judgment); *Carlson* v. *Green*, 446 U.S. 14, 39-40 n.5 (1980) (Rehnquist, J., dissenting).

gress's failure to supply a limitations period for a right of action that it did not enact, but that subsequently was implied by the courts, is hardly surprising and reveals no intent by Congress to absorb state law. See page 20 note 17, *infra*.

Second, and of critical significance, Congress has not been silent about the applicability of federal statutes of limitations to the federal securities actions that it did create. On the contrary, *every* private cause of action explicitly provided in the 1933 and 1934 Acts was accompanied by an *express* limitations period.[15] And, as discussed in detail

[15] In brief, Section 11 of the 1933 Act (15 U.S.C. § 77k) provides an express private cause of action for untrue statements or material omissions in registration statements, and Section 12 (15 U.S.C. § 77*l*) provides an action for untrue statements or material omissions in the sale of securities; both are subject to the one-year/three-year limitations provision in Section 13 (15 U.S.C. § 77m). Section 9(e) of the 1934 Act (15 U.S.C. § 78i(e)) provides an express cause of action for false or misleading statements or actions to manipulate security prices, Section 18 (a, c) (15 U.S.C. § 78r(a, c)) for false or misleading statements in any application, report, or document filed with the SEC, and Section 29(b) (15 U.S.C. § 78cc(b)) for rescission of certain transactions that violate the 1934 Act or rules thereunder; all of these causes of action provide their own one-year/three-year limitations period. (The limitations period for Section 29(b) was added in 1938, see *Data Access*, 843 F.2d at 1545.)

The only exception to this consistent pattern of one-year/three-year limitations periods for the express actions in the 1933 and 1934 Acts is the "short-swing profit" provision in Section 16(b) of the 1934 Act (15 U.S.C. § 78p(b)). Like the other provisions in those Acts, Section 16(b) is subject to an express limitations period, the specified period, however, is two years. In contrast to the above provisions of the Acts (and to Section 10(b)), which are compensatory and remedial in nature, Section 16(b) is strictly a deterrent and prophylactic. See *Ceres Partners*, slip op. 32-33; *Data Access*, 843 F.2d at 1546; Schulman, *Statutes of Limitation in 10b-5 Actions: Complication Added to Confusion*, 13 WAYNE L. REV. 635, 638 (1967). Because of its distinctive character, Section 16(b) does not provide an apt analogy to 10(b) actions for purposes of the statute of limitations. A similar deterrent cause of action, which also contains an explicit limitations period but of five years, was adopted in the Insider Trading and Securities Fraud Enforcement Act of 1988 and is discussed at pages 38-41, *infra*.

below (see pages 24-25, *infra*), those explicit causes of action are quite analogous to 10(b) actions. Given that Congress consistently provided a federal limitations period for each express statutory action, it would be completely inconsistent with the structure of the Acts—and indeed would defy common sense—for the courts to create a contrary rule imposing state limitations periods on the judicially implied 10(b) cause of action. See *FBI* v. *Abramson*, 456 U.S. 615, 625 n.7 (1982) (citation omitted) ("our duty then is 'to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested' ").[16]

Third, the express federal limitations periods enacted by Congress serve important federal policies and embody a deliberate congressional balance between the interests of repose and enforcement. As this Court has emphasized, 10(b) litigation "presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general," and "Congress itself recognized the potential" for such abuses when it enacted the 1933 and 1934 Acts. *Blue Chip Stamps*, 421 U.S. at 739, 740. With particular respect to the issue of limitations, the legislative history establishes that Congress specifically concluded that a period longer than the one-year/three-year statute

[16] Indeed, directly indicating Congress's understanding that federal causes of action should be subject to federal limitations periods, Senator Norris explained that "[r]unning all through the statutes we pass—criminal statutes and civil statutes—there is a statute of limitations. Everyone concedes that it is a wise thing to have a statute of limitations." 78 Cong. Rec. 8199 (1934). See also *Stock Exchange Practices: Hearings on S. Res. 84, S. Res. 56, & S. Res. 97 Before the Senate Comm. on Banking and Currency*, 73d Cong., 1st. Sess. 7561 (1934) (statement of Roland L. Redmond, Attorney, New York Stock Exchange) (referring to the "absurd" situation if "local practices with regard to limitations might result in varied rules of law as to the liability * * * in the Federal courts").

of repose was unnecessary and presented too great a danger of business disruption and abusive litigation. See pages 28-36, *infra*. By contrast, "State legislatures do not devise their limitations periods with national interests in mind." *Wilson*, 471 U.S. at 269 n.18. See also *Burnett* v. *Grattan*, 468 U.S. 42, 51-53 (1984). Since Congress carefully designed the Acts to avoid the problem of untimely lawsuits, it would be entirely inappropriate for courts to discard the expressly prescribed federal limitations and open up implied 10(b) actions to state periods that are both longer and subject to equitable tolling. See, *e.g.*, *Miles* v. *Apex Marine Corp.*, No. 89-1158 (U.S. Nov. 6, 1990), slip op. 12 ("[i]t would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially-created cause of action * * * than Congress has allowed in [express actions]"); *Blue Chip Stamps*, 421 U.S. at 736 ("[i]t would indeed be anomalous to impute to Congress an intention to expand * * * [liability under] a judicially implied cause of action beyond the bounds it delineated for comparable express causes of action").

C. Recent Decisions Of This Court Make Clear That A Federal Statute Of Limitations Should Apply To 10(b) Actions

Application of a federal statute of limitations to 10(b) actions is required not only by the structure, history, and policies of the securities laws, but also by the recent decisions of this Court in *Agency Holding*, *Wilson*, and *DelCostello*. These cases have recognized the applicability of federal rather than state limitations periods in circumstances similar to those presented here.[17]

[17] In *DelCostello*, the Court recognized that the generally applicable limitations analysis "makes more sense as applied to a cause of action expressly created by Congress than as applied to one

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The *Agency Holding* analysis directs courts to borrow a federal statute of limitations when " 'federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that [federal] rule * * * significantly more appropriate.' " 483 U.S. at 148, quoting *DelCostello*, 462 U.S. at 171-172. This standard entails a three-part inquiry: (1) "whether all claims arising out of the federal statute 'should be characterized in the same way' " and thus be subject to a single type of limitations statute, or " 'whether they should be evaluated depending upon the varying factual circumstances and legal theories presented in each individual case' " (483 U.S. at 147, quoting *Wilson*, 471 U.S. at 268); (2) whether the federal or state statute "offers the close[r] analogy" to the cause of action at issue (483 U.S. at 150); and (3) whether the "federal policies at stake and the practicalities of litigation" make the federal limitations period "more appropriate" (*id.* at 153). This analysis demonstrates that a federal statute of limitations is applicable to 10(b) actions.

[17] *continued*
found by the courts to be implied in a general statutory scheme—especially when that general statutory scheme itself contains a federal statute of limitations for a related but separate form of relief." 462 U.S. at 158 n.12. Where Congress has failed to provide a limitations period for an express cause of action, the Court generally has followed "a sort of fallback rule of thumb" that "prefer[s] * * * borrowing state limitations periods" based "on the assumption that, absent some sound reason to do otherwise, Congress would likely intend that the courts follow their previous practice of borrowing state provisions." *Ibid.* This reasoning is simply inapplicable where, as here, a judicially implied rather than a congressionally prescribed cause of action is involved and Congress in fact provided a federal limitations period for every express statutory action it enacted. See *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 68 n.4 (1981) (Stewart, J., concurring in the judgment).

1. A Single Characterization Of 10(b) Claims Is Most Appropriate

As with the civil RICO action in *Agency Holding*, a single characterization of 10(b) claims is most appropriate. Like RICO, 10(b) claims " 'encompass numerous and diverse topics and subtopics.' " *Agency Holding*, 483 U.S. at 149 (citation omitted). "[S]ection 10(b) and Rule 10b-5 embrace a galaxy of actions" (*Data Access*, 843 F.2d at 1543), including suits (as the government explained in its *amicus* brief in *Lebman* (at 10)) that are "readily * * * analog[ous] to actions for common law fraud, breach of contract, breach of fiduciary duty, misappropriation, and violation of blue sky laws, among others." Each of these state claims provides a statute of limitations that is a potential candidate for borrowing in 10(b) actions. Furthermore, like RICO, 10(b) actions were " 'unknown to common law' " (*Agency Holding*, 483 U.S. at 150 (citation omitted)) and " 'have no precise counterpart in state law' " (*Owens* v. *Okure*, 488 U.S. at 248 (citation omitted)). See page 23, *infra*. In these circumstances, any requirement that every individual 10(b) suit be properly matched to one among the multiplicity of possible state law choices would cause "intolerable 'uncertainty and time-consuming litigation.' " *Agency Holding*, 483 U.S. at 150, quoting *Wilson*, 471 U.S. at 272.

2. Federal Rather Than State Law Provides The Closer Analogy To 10(b) Actions

In selecting the appropriate limitations period, the express provisions of the federal securities laws offer a closer analogy to 10(b) actions than do state laws. Indeed, the irreconcilable conflict among the circuits over the proper state limitations statute to borrow (see pages 11-15, *supra*) is proof positive of the intractable difficulty of relying on state law analogies.

As this Court has recognized, "[a]ctions under Rule 10b-5 are distinct from common-law deceit and misrepresentation claims." *Basic Inc.* v. *Levinson*, 485 U.S. 224, 244 & n.22 (1988). See, *e.g.*, *Herman & MacLean* v. *Huddleston*, 459 U.S. at 390 (common-law fraud standard of clear and convincing evidence not applicable to 10(b) claims); *Blue Chip Stamps*, 421 U.S. at 744 (purchaser/seller requirement applicable under Section 10(b) but not under common-law fraud). In fact, modern securities markets and practices fundamentally "differ from the face-to-face transactions contemplated by early fraud cases" (*Basic*, 485 U.S. at 243-244), and "the typical fact situation in which the classic tort of misrepresentation and deceit evolved was light years away from the world of commercial transactions to which Rule 10b-5 is applicable." *Blue Chip Stamps*, 421 U.S. at 744-745. Accordingly, "far from being a mirror image or a reasonable facsimile of common law fraud, actions brought under section 10(b) and Rule 10b-5 appear to be *sui generis*." *Data Access*, 843 F.2d at 1545.

Likewise, state blue sky laws do not provide an apt analogy to 10(b) actions. Such state laws "come[ ] in a variety of shapes and sizes" (Loss, *supra*, at 877) and frequently differ both from one another and from federal law. For example, some blue sky laws protect only purchasers and not sellers of securities, some fail to establish liability for secondary participants (such as accountants and attorneys) who assist a wrongdoing seller, and some fail to provide a damages remedy for violations. See *Data Access*, 843 F.2d at 1544. Given the limited nature of and variations among these provisions, state blue sky laws do not offer a close analogy to 10(b) actions.

By contrast, the express causes of action in the federal securities laws are quite similar to 10(b) claims. See page 18 note 15, *supra*. These explicit provisions of the 1933 and 1934 Acts were, of course, enacted contemporaneous-

ly with Section 10(b) and, as the immediate context in which Section 10(b) was drafted and passed, offer a revealing insight into the proper application of that section and the general securities law policies that Congress adopted.

Just as the civil RICO provision "was patterned after" the Clayton Act (*Agency Holding*, 483 U.S. at 150), which led the Court to borrow the Clayton Act's statute of limitations for RICO actions, the 10(b) remedy bears a close resemblance to several of the express liability provisions of the 1933 and 1934 Acts. For example, Sections 11 and 12 of the 1933 Act (15 U.S.C. §§ 77k, 77*l*), and Sections 9(a) and 18(a) of the 1934 Act (15 U.S.C. §§ 78i(a), 78r(a)), establish express causes of action (and are subject to an express statutory limitations period) against a defendant who makes an "untrue statement of a material fact" or omits "to state a material fact * * * necessary to make the statement[ ] * * * not misleading."[18] In the same fashion, Section 10(b) forbids the use of any "manipulative or deceptive device or contrivance" in connection with a sale of securities, and Rule 10b-5 renders it unlawful "[to] make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5. Furthermore, as this similarity in language would suggest, Section 10(b) and the express causes of action in the 1933 and 1934 Acts "are aimed at the same objectives," "aim to compensate the same type of injury," and "are designed to fill a void in the common law and to create remedies that would be uniform throughout our nation's commercial universe." *Data Access*, 843 F.2d at 1548-1549.

[18] Section 9 of the statute provides a cause of action against a defendant who either "creat[es] a false or misleading appearance of active trading" (§ 9(a)(1)) or "make[s] * * * any statement which was at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact" (§ 9(a)(4)).

Thus, "the securities acts are addressed to the conduct at stake in this case—securities fraud"; "in particular, [Section 12] covers the express right of action * * * [for] incorrect statements and material omissions in the course of selling securities"—precisely the type of conduct plaintiffs have alleged here. *Short*, 908 F.2d at 1388. It is these explicit causes of action in the federal securities laws, not state fraud or blue sky laws, that constitute the proper analogy to 10(b) actions.

3. Federal Securities Policies And The Practicalities Of Litigation Support Application Of A Uniform Federal Limitations Period

The policies of the federal securities laws and the practicalities of securities litigation also support application of a uniform federal limitations period in 10(b) actions. As noted above (see pages 17-20, *supra*), Congress's enactment of a federal regulatory scheme, and its inclusion of a statute of limitations for every express action it created, demonstrate the important federal policy of having uniform limitations periods in securities cases.

The "practicalities" of 10(b) litigation provide additional "compelling reasons" for a uniform federal limitations period. *Agency Holding*, 483 U.S. at 153. Absent such federal uniformity, 10(b) actions would be governed by a variety of state statutes of limitations that range from one to 10 years. See pages 11, 13-14, *supra*. As with civil RICO, such a patchwork of "state statutes would present the danger of forum shopping and, at the very least, would 'virtually guarante[e] * * * complex and expensive litigation over what should be a straightforward matter.' " *Id.* at 154 (citation omitted). This concern is particularly substantial in

light of the liberal venue and service-of-process provisions in the federal securities laws. See page 14, *supra*.

In addition, the federal securities laws were intended to provide uniform regulation of nationwide markets. See, *e.g.*, 15 U.S.C. § 78b. And, like civil RICO, "some nexus to interstate or foreign commerce is required as a jurisdictional element of a [10(b)] claim"; indeed, 10(b) cases "commonly involve interstate transactions" so that "the statute of limitations of several States could govern any given [10(b)] claim." *Agency Holding*, 483 U.S. at 153-154. Given the "multi-state nature" of 10(b) suits (*id.* at 154), the overarching interest in uniformity weighs heavily in favor of a federal limitations period.

Finally, the existing legal disarray in the applicable statute of limitations generates needless confusion in the business and financial communities and wasteful litigation in the federal courts. See pages 11-15, *supra*. "Congress intended the identification of the appropriate statute of limitations to be an uncomplicated task for judges, lawyers, and litigants, rather than a source of uncertainty, and unproductive and ever-increasing litigation." *Wilson*, 471 U.S. at 275. Such "uncertainty is costly to all parties," depriving plaintiffs of their "just remedy" if they incorrectly predict the applicable period and denying defendants both the ability to "calculate their contingent liabilities" and the peace of mind of "knowing with confidence when their delicts lie in repose." *Id.* at 275 n.34. Thus, as the Court has recognized in other areas, "[t]he federal interests in uniformity, certainty, and the minimization of unnecessary litigation all support the conclusion" (*id.* at 275) that the implied 10(b) cause of action should be subject to a uniform federal limitations period drawn from the express statutes of limitations in the federal securities laws.

II. THE APPROPRIATE FEDERAL LIMITATIONS PERIOD FOR 10(b) ACTIONS IS THE ONE-YEAR/THREE-YEAR PROVISION IN THE 1933 AND 1934 ACTS

The federal securities laws contain two limitations periods that have been suggested as appropriate for borrowing in private 10(b) actions. In our view, the applicable federal statute of limitations is the one-year/three-year provision in the 1933 and 1934 Acts. The SEC, on the other hand, has proposed the five-year provision in the Insider Trading and Securities Fraud Enforcement Act of 1988 ("ITSFEA").

All three of the cases that have considered these two federal limitations periods have adopted the one-year/three-year-rule.[19] A careful examination of the structure, history, and policies of the 1933 and 1934 Acts and the ITSFEA demonstrates that this conclusion plainly is correct.

In enacting the 1933 and 1934 securities laws, Congress specifically determined that a five-year limitations period was too long and would invite unfounded and abusive litigation. Accordingly, for all but one of the express statutory causes of action—actions closely analogous to the 10(b) action subsequently implied by the courts—Congress deliberately crafted the one-year/three-year provision to bar lawsuits that it considered untimely and undesirable.

This congressional determination is controlling here. It is the contemporaneous legislation on which 10(b) actions ultimately rest, not the ITSFEA enacted decades later, that informs the appropriate limitations period for such implied suits under the 1934 Act. See *Touche Ross & Co.*

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[19] See *Ceres Partners*, slip op. 29-37, aff'g 714 F. Supp. 679, 684-685 (S.D.N.Y. 1989); *Short*, 908 F.2d at 1390-1392; *Elysian Fed. Sav.*, 713 F. Supp. at 742-745; see also *Data Access*, *supra* (adopting the one-year/three-year limitations period prior to enactment of ITSFEA).

v. Redington, 442 U.S. at 574-575 n.16 ("[g]iven the fact that our task is to discern the intent of Congress when it enacted § 17(a) in 1934, we doubt the relevance of [subsequent legislation] to our inquiry"); see also *Universities Research Ass'n* v. *Coutu*, 450 U.S. 754, 778 (1981).

As the Seventh Circuit explained in *Short* (908 F.2d at 1390), "[a]ny court choosing a federal statute of limitations between 1946 (the date of the first decision recognizing a private right of action under Rule 10b-5) and 1988 necessarily would have selected the [one-year/three-year provision]."[20] It is thus anomalous for the SEC to assert that Congress in 1988, without any indication of an intent to do so, fundamentally revised the policies of the 1934 Act and retrospectively changed the limitations period that should have been applied for decades. In fact, contrary to the SEC's position, Congress specifically confined the ITSFEA to the unique problem of insider trading and expressly provided that the statute would *not* affect general 10(b) law. In these circumstances, it is the one-year/three-year limitations provision that the Court should apply in 10(b) actions.

A. In The 1933 And 1934 Acts, Congress Adopted An Outer Limitations Period Of Three Years And Specifically Rejected A Five-Year Period

The limitations provisions in the 1933 and 1934 Acts "have an extensive legislative history" that "is highly relevant to the assertion of implied claims, and strongly rebuts any intention on the part of Congress that implied

[20] The SEC concedes as much (*Lebman* Am. Br. 16): "when an implied right of action under Rule 10b-5 was first recognized more than forty years ago, the selection of those [express] limitations periods [in the 1933 and 1934 Acts] rather than state law arguably would have been the better solution."

claims should have a more liberal period of limitation than the remedies Congress expressly created." Bloomenthal, *The Statute of Limitations and Rule 10b-5 Claims: A Study in Judicial Lassitude*, 60 COLO. L. REV. 235, 258-259 (1989).

Starting with the Securities Act of 1933, Congress consistently has set forth an explicit federal limitations period for every express cause of action it has enacted. The original 1933 Act provided that any private civil actions must be brought within two years of the discovery of the violation and in no event more than 10 years after the violation. 48 Stat. 74 (1933). Congress recognized that a statute of limitations was necessary to prevent a plaintiff from "sleep[ing] on his rights"; without a limitations period, a plaintiff, "if the stock market was all right, could fail to proceed, or take no action, but if the stock market should subsequently turn unfavorable, then * * * [he would have] the opportunity to prosecute for fraud or the recovery of the purchase price." *Federal Securities Act: Hearing on H.R. 4314 Before the House Comm. on Interstate and Foreign Commerce*, 73d Cong., 1st Sess. 215 (1933) (statements of Rep. Thompson and Rep. Lea).

The ensuing Securities Exchange Act of 1934 was subject to "considerable organized and vocal opposition * * * fueled in part by a reaction to some of the civil liability provisions of the [1933] Securities Act." Bloomenthal, *supra*, 60 COLO. L. REV. at 260.[21] "As a result of the campaign waged by Wall Street and others against the Exchange Act, revisions were made both at the committee level (particularly in the House) and on the floor of the Senate to make the Act less objectionable to its critics." *Ibid.* See also *Blue Chip Stamps*, 421 U.S. at 753-754. As Senator Fletcher, the Senate floor manager, explained in

[21] On the legislative history, see also, *e.g.*, Bloomenthal, *supra*, Parts I & II, 7 SEC. & FED. CORP. L. REP. 17 (Mar. 1985), 25 (Apr. 1985); 4 Bromberg & Lowenfels, *supra*, § 11.9(200), at 11:203.

offering an amendment concerning the limitations provisions, "[t]he effort has been made to meet objections and criticisms and complaints which have come to the committee that the present act is too drastic," and "no objection has been raised to the amendment." 78 Cong. Rec. 8668 (1934).

In particular, significant changes were made in the limitations provisions in both the pending 1934 proposal and the existing 1933 Act, which was revised to conform to the 1934 Act. See 78 Cong. Rec. 8198, 8668, 8669 (1934); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. at 210. By providing a one-year/three-year limitations period in the amended Section 13 of the 1933 Act (which applied to actions under Sections 11 and 12) and in the express statutory action sections in the 1934 Act, Congress evidenced its clear intent that this period would govern private securities suits in general (absent a specific limitations provision to the contrary for a particular cause of action).

The original 1934 Senate bill provided that "[n]o action shall be maintained to enforce any liability created under [the express causes of action] unless brought within two years after the discovery of the facts constituting the violation [or the cause of action], nor unless brought within six years after such violation [or the cause of action accrued]." S. 3420, 73d Cong., 2d Sess. §§ 9(e), 18(c) (1934). The Senate Report generally noted the need "to give protection against 'strike' suits, or litigation brought in bad faith." S. Rep. No. 792, 73d Cong., 2d Sess. 18 (1934). The original House bill also contained an express statute of limitations, which, in contrast to the Senate version, provided that "[n]o action shall be maintained to enforce any liability created under this section unless brought within three years after the violation upon which it is based." H.R. 9323, 73d Cong., 2d Sess. §§ 8(e), 17(c) (1934); see also H.R. Rep. No. 1383, 73d Cong., 2d Sess. 21, 25 (1934).

These limitations provisions were the focus of extensive congressional consideration. In the Senate, Senator Fletcher introduced an amendment to reduce the two-year/six-year period to a one-year/five-year period on the ground that the original bill "allows too much leeway there." 78 Cong. Rec. 8197-8198 (1934). Senator King also repeatedly stated that the six-year period was "rather * * * long" and asked whether the committee had considered "limiting the period to 4 years or 3 years." *Id.* at 8198. Senator Norris agreed that six years was "too long." *Ibid.*

The Senate indicated its intention that the limitations period be "just and fair to both sides." 78 Cong. Rec. at 8200 (statement of Sen. Byrnes). It also expressed its general concern, however, about "blackmail suits * * * [and] purely contentious litigation." *Id.* at 8669 (statement of Sen. Fletcher).[22] As Senator Fletcher stressed, it was essential that "the person who made the misrepresentation or false statement ought to feel safe at some reasonable time that he will not be disturbed." *Id.* at 8198.

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[22] Concern over vexatious and baseless litigation repeatedly emerged in various contexts during the congressional hearings. See *Stock Exchange Regulation: Hearing on H.R. 7852 & H.R. 8720 Before the House Comm. on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. (1934) at 208 (statement of Richard Whitney, President, New York Stock Exchange) ("[i]t is obvious that provisions of this character will be productive of endless litigation and innumerable blackmail or 'strike' suits"), 303 (statement of Frank R. Hope, President, Association of Stock Exchange Firms) ("[t]he liabilities imposed are severe and would undoubtedly be used by unscrupulous purchasers, when they made an unfortunate purchase, as a means of forcing some settlement or contribution from the broker"); *Stock Exchange Practices: Hearings on S. Res. 84, S. Res. 56, & S. Res. 97 Before the Senate Comm. on Banking and Currency*, 73d Cong., 1st Sess. (1934) at 6633 (statement of Mr. Whitney) (same), 6909 (statement of Mr. Hope) (same), 6939 (statement of Alfred L. Burnheim, Twentieth Century Fund, Inc.) ("[a] provision of this sort invites blackmail and nuisance suits"), 6987 (statement of Eugene E. Thompson, President, Associated Stock Exchanges) ("the opportunity for blackmail is too apparent for safety").

Special concern was expressed that lengthy limitations periods "would deter men from serving on boards of directors" because of apprehension that their estates would be "liable * * * to * * * suit. * * * [W]e should bring to an end [their] fear, or the fear of [their] estate[s], of * * * suit." *Id.* at 8200 (statements of Sen. Byrnes).[23]

In addition, the Senate understood that an unduly lengthy limitations period would be undesirable and unfair because it would encourage plaintiffs to delay suit in order to speculate on the market: on the one hand, the plaintiff would benefit from the transaction if the market rose, and therefore would forgo litigation; on the other, he could sue if the market declined, thereby effectively treating the defendant as an insurer of his market speculation.

> [I]f a man buys something today and discovers tomorrow that some mistake has been made and perhaps he has a ground for suit because of fraud, under the terms of the bill he must bring his suit within 1 year. But suppose he thinks, "Perhaps the bonds I have bought will go up. I will not bring suit until I find out about that. If the bonds go down then I will have the option of suing these people and trying to recover. If the bonds go up, then I will not sue because I can get a profit on them.
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> [I]f he finds some technical mistake in the statement that has been put out, he might say to himself, "I have something that I can sue on if these bonds go down. If they go up I will not want to sue because I will get a profit on them, but should they go down, then I have the option of suing."

[23] See also William O. Douglas & G. Bates, *The Federal Securities Act of 1933*, 43 YALE L.J. 171, 195 (1933) ("The experience and judgment of men of affairs is of great value to most of our more important corporations. To deprive enterprises of this asset would seem uneconomic").

78 Cong. Rec. 8199 (1934) (statements of Sen. Kean). See *Blue Chip Stamps*, 421 U.S. at 747.[24]

The Senate specifically considered the objection that the amended one-year/five-year limitations period was "too short." 78 Cong. Rec. 8199, 8200 (1934) (statements of Sen. Norris and Sen. Adams). Of particular importance here in light of the SEC's position (see pages 43-44, *infra*), Senator Adams objected that "a limitation of a year is entirely inadequate" because "the plaintiff must prove that the false statement was willful." *Id.* at 8200. These criticisms were unavailing, however, and the Senate adopted the one-year/five-year limitations provision.

The Senate debates also make clear that this limitations provision imposed an absolute statute of repose that could not be extended on equitable grounds. As Senator Barkley explained:

> It really is not two limitations. If a man makes no discovery of fraud within the time limit of the statute then he cannot sue at all. The lapse of the 5 years * * * bars him from bringing suit at all where he has made the discovery. But if within that time he makes discovery of fraud and damage, then he is required to bring suit within 1 year after such discovery.
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> * * * * *

[24] See also *House Stock Exchange Regulation Hearing*, *supra*, at 303 (statement of Mr. Hope) ("They could engage in speculative purchases and could keep the benefits if the purchases turned out successful. If they were unsuccessful they could try to recover from their broker because of something they claimed they had heard him say, and if they could not recover, possibly force a settlement"), 307 (statement of Mr. Hope) (the statute is "particularly burdensome and puts tremendous advantages in the hands of a speculator to cover himself from bad speculation through endeavoring to force recovery from his broker for alleged misstatements"); *Senate Stock Exchange Practices Hearings*, *supra*, at 6565 (statement of Sen. Kean) ("[t]hey discover it after the market has gone down, and after something has happened, and they are looking for mistakes, and years afterward there is liability").

> [T]he 5-year limitation fixes the ultimate period of limitation when he can bring suit. But if a man discovers within 6 months, or 1 month, after he has been defrauded, that he has been defrauded—and he knows it just as well then as he would know it 3 years from that date—it does seem that he ought not to be allowed to let the whole period of the limitation run and within a week or two of its expiration bring suit on a transaction when he knew 4 years before that he had a right to sue.

78 Cong. Rec. 8198, 8200 (1934).[25] This fixed cutoff was expressly intended to prevent "blackmail." *Senate Stock Exchange Practices Hearings*, *supra*, at 6565 (statement of Sen. Kean); see also *id.* at 6566, 6718, 6993, 7561, 7743-7744. Thus, as the statutory language provides (15 U.S.C. § 77m) "[i]n no event" could suit be brought after the expiration of the outer time limit. The Solicitor General, courts, and commentators agree that this limitations provision is not subject to equitable tolling or estoppel.[26]

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[25] See also 78 Cong. Rec. at 8198 (statement of Sen. Fletcher) ("the time ought to be limited to 5 years"), *ibid.* (statement of Sen. Byrnes) ("a final limitation of 5 years"; "after 5 years * * * a suit may not be brought at all"); *ibid.* (statement of Sen. Norris) ("a final limit"); *ibid.* (statement of Sen. King) ("[s]uppose a person against whom a fraud was committed did not discover it until 6 years and 1 day [under the original bill]; then no action would lie"); *id.* at 8201 (statement of Sen. Barkley) ("After that 6-year period [under the original bill] he cannot bring suit. He might discover the fraud 5 years, 11 months and 29 days after it was committed, but he could still bring suit if he brought it on the thirtieth day, or on the first day after he made the discovery").

[26] See U.S. *Lebman* Am. Br. 14 n.17 ("The judicial consensus is that the three year outer limit of the Exchange Act one-and-three year limitations period is an absolute bar and is not subject to equitable tolling. * * * The legislative history of the Exchange Act confirms that Congress intended these periods to be absolute in order to ensure repose"); *Short*, 908 F.2d at 1391 ("[u]nless the 'in no event more than three' language cuts off claims of tolling and estoppel at three years, however, it serves no purpose at all"); *Norris*, 818 F.2d at 1332 ("[t]he legislative history in 1934 makes

(Footnote continued on following page)

The difference between the Senate's one-year/five-year limitations provision and the House's three-year provision was resolved at conference. Adopting the Senate's approach of a two-tier statute of repose but the House's outside time limit, the statute as enacted provides an express one-year/three-year statute of limitations. The conference committee made clear that this limitations provision is an absolute bar, "requir[ing] such suits to be brought within 1 year after the discovery of the facts constituting the violation and *in any event* within 3 years after such violation." H.R. Conf. Rep. No. 1838, 73d Cong., 2d Sess. 32 (1934). See also *id.* at 36; 78 Cong. Rec. at 10,186 (statement of Sen. Byrnes) ("[T]he new laws will permit such a suit to be brought only within three years. * * * Under the new law, a suit must be brought within 3 years").

In summary, the following conclusions can be drawn from the legislative history of the 1933 and 1934 Acts. First, by applying the one-year/three-year provision to *all* private actions in *both* the 1933 and 1934 Acts (unless otherwise specifically provided), Congress expressed its intention that private litigation generally under these statutes would be subject to this limitations period. Second, Congress deliberately enacted a relatively short limitations provision, specifically reducing both the 10-year period contained in the original 1933 Act and the five-year period proposed in the 1934 Senate bill. Third, this short limitations period reflected a paramount federal policy requiring securities litigation to be brought promptly, in order to avoid unfair burdens and uncertainty for defendants, opportunistic litigation delays by plaintiffs, and

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[26] *continued*
it pellucid that Congress included statutes of repose because of fear that lingering liabilities would disrupt normal business and facilitate false claims"); ABA Report at 655 (drawing "the inescapable conclusion that Congress did not intend equitable tolling to apply in actions under the securities laws").

unwarranted and vexatious lawsuits in general. Fourth, the outer three-year period was designed to be an absolute maximum that prohibits suit from being brought for any reason after that date. Thus, as the Seventh Circuit has concluded, Congress enacted the express limitations provisions based on the "fear that lingering liabilities would disrupt normal business and facilitate false claims" (*Norris*, 818 F.2d at 1332) and the concern that "investors [not] gamble with other people's money" and benefit from "the wisdom given by hindsight." *Short*, 908 F.2d at 1392.

These propositions are fatal to the SEC's contention that a five-year limitations period should be applied in 10(b) actions. "[A]ttach[ing] more significance to a policy of repose than to protecting investors," Congress specifically rejected a five-year period as too long, and "selected with deliberation" a maximum three-year period instead. Bloomenthal, *supra*, 60 COLO. L. REV. at 262. Having enacted a one-year/three-year limitations provision for every express cause of action in the 1933 and 1934 Acts analogous to the subsequently implied 10(b) action, it is inconceivable that Congress would not have adopted the same provision for causes of action under Section 10(b); "[t]here can be little doubt that Congress would have imposed a similar policy of repose on an implied action based upon violation of section 10(b) and the rules adopted thereunder." *Ibid.*

B. The Insider Trading And Securities Fraud Enforcement Act Of 1988 Does Not Support Application Of A Five-Year Federal Limitations Period In 10(b) Actions

In the face of this overwhelming evidence of congressional intent, the SEC errs in asserting that the ITSFEA supports the borrowing of a five-year limitations provision in 10(b) actions. The government's position fails because (1) the private cause of action for insider trading

is not analogous to 10(b) suits in general; (2) Congress specifically limited the ITSFEA to insider trading suits and disclaimed any intention of affecting the law under Section 10(b) in other respects; and (3) unlike the absolute limitations periods expressly provided in the 1933 and 1934 Acts, the five-year provision in the ITSFEA apparently may be tolled on grounds of fraudulent concealment and equitable estoppel--an uncertain limitations protection that, as the SEC itself seems to recognize, Congress would not have intended for 10(b) suits.[27]

Because the ITSFEA is modeled on the Insider Trading Sanctions Act of 1984 ("ITSA"), we begin with a brief overview of the 1984 statute. As its title suggests, this Act was Congress's response to the escalating problem of insider trading. In particular, it authorizes the SEC to bring suit in such cases for "a civil penalty." Unlike a plaintiff's out-of-pocket damages in a private securities case—which in modern class action litigation can reach tens or even hundreds of millions of dollars—this carefully circumscribed civil penalty is based on "the profit gained or loss avoided" by the defendant and "shall not exceed three times" that amount. 15 U.S.C. § 78u-1(a)(2).[28] The purpose of the Act was to deter and punish violations, not to compensate investors. H.R. Rep. No. 355, 98th Cong., 1st Sess. 2 (1983).

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[27] It has consistently been held that in "cases relating to implied causes of action, the Court has understandably not invoked the 'administrative deference' rule" to give special weight to the views of the SEC. *Piper* v. *Chris-Craft Industries*, 430 U.S. 1, 41 n.27 (1977).

[28] The relevant provisions of the ITSA (which initially were codified in Section 21(d)(2) of the Securities Exchange Act of 1934) were recodified verbatim by the ITSFEA as Section 21A of the 1934 Act. Compare 15 U.S.C. § 78u-1 (1988) with 15 U.S.C. § 78u(d)(2) (Supp. IV 1986); see also H.R. Rep. No. 910, 100th Cong., 2d Sess. 35, 37 (1988). Citations in this brief to the ITSA refer to the statute as recodified in 1988 and currently in effect.

The ITSA further provides that "[n]o action may be brought under this section more than five years after the date of the purchase or sale." 15 U.S.C. § 78u-1(d)(5). See H.R. Rep. No. 355, at 12, 17. The legislative history explains that the "five-year statute of limitations for penalty actions * * * conforms to the five-year statute of limitations for criminal violations of the Securities Exchange Act." *The Insider Trading Sanctions Act of 1983: Hearing on H.R. 559 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs*, 98th Cong., 2d Sess. 28 (1984) (statement of SEC Chairman John S.R. Shad).[29] While SEC civil injunctive actions generally are not subject to a statute of limitations (see page 4 note 2, *supra*), a limitations period was thought appropriate in this Act because of the "treble penalty" provided, and the SEC did not oppose inclusion of the limitations provision. *Insider Trading Sanctions and SEC Enforcement Legislation: Hearing on H.R. 559 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. 57 (1983) (statement of John R. Fedders, Director, SEC Division of Enforcement); see also *id.* at 28-29, 46, 91, 95, 201, 251-252; H.R. Rep. No. 355, at 27, 29-30.

The Insider Trading Sanctions Act of 1984 proved to be an insufficient deterrent to insider trading. To supplement the ITSA, therefore, Congress passed the Insider Trading and Securities Fraud Enforcement Act of 1988. As Congress declared in its Statement of Findings, "additional methods are appropriate to deter and prosecute violations [of the insider trading laws]." 15 U.S.C. § 78u-1 note. See also H.R. Rep. No. 910, 100th Cong., 2d Sess. 7, 11 (1988).

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[29] See 18 U.S.C. § 3282 (five-year criminal statute of limitations); see also 28 U.S.C. § 2462 (five-year statute of limitations for a "civil fine, penalty or forfeiture").

The ITSFEA affirmed and strengthened the SEC's authority to seek civil penalties up to three times the profit gained or the loss avoided. More importantly for present purposes, Section 20A of the Act also provides a "[p]rivate right[ ] of action based on contemporaneous trading." An insider trader

> shall be liable in an action in any court of competent jurisdiction to any person who, contemporaneously with the purchase or sale of securities that is the subject of such violation, has purchased (where such violation is based on a sale of securities) or sold (where such violation is based on a purchase of securities) securities of the same class.

15 U.S.C. § 78t-1(a). The Act further provides a "[l]imitation[ ] on liability" based on principles of disgorgement, stating that "[t]he total amount of damages imposed under subsection (a) of this section shall not exceed the profit gained or loss avoided in the transaction or transactions that are the subject of the violation." 15 U.S.C. § 78t-1(b)(1). See also 15 U.S.C. § 78t-1(b)(2) (private remedy to be offset by disgorgement obtained by SEC).

With respect to this express private remedy, the ITSFEA supplies an explicit statute of limitations: "[n]o action may be brought under this section more than 5 years after the date of the last transaction that is the subject of the violation." 15 U.S.C. § 78t-1(b)(4). The bill introduced in the Senate, as well as that proposed by the SEC, expressly incorporated by reference the limitations provision of the ITSA; the House bill simply reiterated that provision with only technical conforming changes, and the Act was passed in that form. See H.R. 5133, 100th Cong., 2d Sess. § 21A(d)(5) (1988); S. 1380, 100th Cong., 1st Sess. § 16A(f) (1987); *The Insider Trading Proscriptions Act of 1987: Hearing on S. 1380 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban*

Affairs, 100th Cong., 1st Sess. 30 (1987) (SEC proposed bill).

The SEC contends that it is this five-year limitations provision that should be borrowed for implied 10(b) causes of action. Seizing on the fortuitous enactment of the 1988 statute—a statute that even the SEC does not claim specifically extends beyond insider trading—the SEC's argument represents a result-oriented attempt to find the longest possible federal securities limitations period based on nothing more than the agency's own policy preference. The SEC treats the ITSFEA like a *deus ex machina*, conveniently intervening after half a century to provide a platform for the erection of its argument. This ahistorical approach is an inappropriate method for ascertaining and implementing the policies of Congress. Despite the SEC's contentions, the one-year/three-year provision in the 1933 and 1934 Acts plainly remains the more appropriate statute of limitations to apply.[30]

First, while the express causes of action in the 1933 and 1934 Acts are closely analogous to the 10(b) action (see pages 24-25, *supra*), the private insider trading cause of action in the ITSFEA is quite dissimilar. The insider trading provision is deterrent in nature, not remedial, as its legislative history makes clear. In the same vein, disgorgement relief is entirely a function of the defendant's benefit (either profit gained or loss avoided) from the insider trading, which normally is fixed at or shortly after the time of the violation. By contrast, an out-of-pocket damages remedy may depend on the future market performance of the security—which was one of the principal reasons Congress enacted a short limitations period in the 1933 and 1934 Acts (see pages 32-33, *supra*), but which is irrelevant to disgorgement. See *Short*, 908 F.2d at 1392. Congress's concerns over open-ended liabilities arising long after the date of the alleged violation—concerns greatly intensified by modern class action procedures—apply precisely to implied claims under Section 10(b); it is only because of the limited penalty under the 1988 legislation that a more extended limitations period was thought to be justified.

Second, Congress narrowly restricted the ITSFEA to insider trading and eschewed any intention to affect implied remedies under Section 10(b) and Rule 10b-5. See 15 U.S.C. § 78t-1(d) ("[n]othing in this section shall be construed to limit or condition * * * the availability of any cause of action implied from a provision of this chapter"). This statutory provision is reinforced by its legislative history, which carefully distinguishes the usual private damages remedy for an injured party under the securities laws from the disgorgement provision for contemporaneous traders (whether or not proximately injured by the defendant's violation) under the ITSFEA. See H.R. Rep. No. 910, at 27 ("there clearly are injuries caused by insider trading to others beyond contemporaneous traders," and the legislation "avoid[s] creating an express cause of action which might have the unintended effect of freezing the law or in any way restricting the potential rights of action which have been implied by the courts in this area"); see also *id.* at 28; 134 Cong. Rec. S17218, S17220

[30] The inherent vulnerability of the SEC's position may be seen in the following way. If Congress in the 1934 Act, instead of including a limitations provision in each of the sections creating a cause of action, instead had adopted a single limitations provision applicable to the entire Act—which in fact is the approach that Congress followed in Section 13 of the 1933 Act—there would be no basis for the SEC to argue that the 1988 statute for insider trading suits would have *sub silentio* repealed or amended the 1934 limitations provision. Thus, it is only because of the form of the 1934 Act that the SEC can even advance its argument. Given the strong congressional policies expressed in the one-year/three-year provision and the broad application of that provision across the 1933 and 1934 Acts, it is clear that the basis for the SEC's position is entirely a matter of form and not of substance and provides no reliable guide to the intention of Congress.

(daily ed. Oct. 21, 1988) (statements of Sen. Proxmire and Sen. Garn). Contrary to this clear congressional intent, the SEC's application of the ITSFEA's five-year limitations provision to all 10(b) claims would "limit" or "restrict[ ]" actions that were permissible under existing law prior to 1988.

Third, in contrast to the express limitations provisions in the 1933 and 1934 Acts, the five-year provision in the ITSFEA does not appear to be a statute of repose that absolutely bars suits after the specified time regardless of equitable tolling or estoppel. In its *amicus* brief to this Court in *Lebman* (at 14 n.17), the SEC went to great lengths to argue that the ITSFEA limitation is an absolute statute of repose, and this assertion is an important if not essential premise for the remainder of its submission that this provision should be borrowed in 10(b) suits.

As the court pointed out in *Short*, however, the five-year provision "appears to be an ordinary statute of limitations" rather than a statute of repose; "[t]he language is in the traditional form of a statute of limitations," and the SEC has not "cite[d] any legislative history indicating that it is more potent than the usual variety." 908 F.2d at 1391.

> The difference between statutes of limitations and statutes of repose is substantial in securities litigation. * * * All of the express provisions in the '33 and '34 Acts * * * are drawn as statutes of repose, and deliberately so. * * *
>
> Setting an outer limit for claiming fraud or material omissions in the sale of securities is an important aspect of [the limitations provisions in the 1933 and 1934 Acts, and] one of the principal reasons Congress designed the statute that way.

Id. at 1392. The limited nature of disgorgement relief may explain why Congress was content in the ITSFEA to enact both a longer limitations provision and one that is not

a statute of repose. See *ibid.* ("Section 20A may use a five-year period, and be drafted as an ordinary statute of limitations, precisely because the reasons for setting the shorter one-and-three period for fraud are not present"). But the SEC has offered no reason why Congress would have wanted to depart in implied 10(b) suits from its otherwise consistent pattern in the 1933 and 1934 Acts of adopting short limitations provisions that constitute absolute periods of repose. See ABA Report at 655 ("[a]gainst the clear evidence that Congress affirmatively intended that no tolling doctrine would be available for the express limitations periods for securities actions, it seems implausible that Congress intended such a doctrine to apply to the implied 10b-5 cause of action").

The SEC's brief in *Lebman* advances three grounds for preferring the five-year provision in the ITSFEA, but these do not support its conclusion. The SEC initially takes comfort (*Lebman* Am. Br. 12, 17) from the fact that the ITSFEA is a recent enactment and, as the court phrased the argument in *Short* (908 F.2d at 1391), "represents Congress' latest thoughts." As explained above (see pages 19-20, 27-28, 40, *supra*), however, the recent vintage of the ITSFEA cuts against the SEC's position, for it is the intent and policies behind the 1933 and 1934 Acts that are controlling on the cause of action implied under the 1934 Act. In any event, for the reasons already discussed, the ITSFEA does not in any way undermine or contradict the import of the 1933 and 1934 Acts in this context. Quite simply, in view of the limited scope and focused purpose of the ITSFEA, it "represents Congress' latest thoughts" on a statute that has little if any relationship to ordinary damages litigation under Section 10(b).

Perhaps revealing its true purpose, the SEC also emphasizes (Br. 16) that the five-year provision should be borrowed simply because it is longer than the one-year/three-year provision and thus more favorable to plaintiffs.

But that search for a lengthy limitations period is precisely backwards. Congress deliberately adopted the *shorter* period (and specifically *rejected* a five-year period) in order to further important federal policies under the 1933 and 1934 Acts—policies that, while not appertaining to the limited cause of action in the ITSFEA, are directly relevant to the implied 10(b) cause of action. What is more, Congress did so despite the concern expressed at the time, and repeated now by the SEC, that the one-year/three-year period is too short, especially in light of the scienter requirement in 10(b) suits. See page 33, *supra*. And, as the SEC is forced to admit (Br. 16 n.19), the one-year/three-year limitations provision is expressly applicable to actions under Section 9 of the 1934 Act (15 U.S.C. § 78i), which, like 10(b) actions, require scienter.[31]

Like Congress, this Court too has underscored the problems caused by burdensome and unwarranted securities litigation—problems that would be greatly exacerbated by the longer limitations period the SEC advocates. As the Court has noted, 10(b) suits "present[ ] a danger of vexatiousness different in degree and in kind" from other litigation. *Blue Chip Stamps*, 421 U.S. at 739. "[E]ven a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgement." *Id.* at 740. See also *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465, 477 (1982) ("the potency of the remedy implies the need for some care in its application").

[31] It is significant that state blue sky limitations, which many courts currently apply to 10(b) actions, generally range from one to three years. ABA Report at 650. This is quite in line with the one-year/three-year provision and rebuts the SEC's assertion that such a period is unreasonably short in 10(b) cases. See also *Ceres Partners*, slip op. 35-36.

A plaintiff's ability to extract such an unduly favorable settlement results from a number of considerations: that "[t]he very pendency of the lawsuit may frustrate or delay normal business activity of the defendant which is totally unrelated to the lawsuit" (*Blue Chip Stamps*, 421 U.S. at 740); that there is "the threat of extensive discovery" even in "a lawsuit which is groundless in any event, but cannot be proved so before trial" (*id.* at 742-743); that the "inherent[ ] imprecis[ion]" of 10(b) requirements (*Dirks* v. *SEC*, 463 U.S. 646, 658 n.17 (1983)) and "the indefinite and uncertain disclosure obligations imposed" (*Teamsters* v. *Daniel*, 439 U.S. 551, 569 (1979)) make it all too easy to allege a colorable violation; that a defense against even unmeritorious claims entails "high costs" (*Piper* v. *Chris-Craft Industries*, 430 U.S. 1, 40 (1977)); and that "[c]ertification of a large class," as is common in securities cases, "may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978). Securities trials also involve the special risk of a substantial verdict against a corporate defendant due to jury sympathy for the plaintiff and antipathy for a large (and often out-of-state) company. The statute-of-limitations defense is an important means of weeding out unjustified claims prior to trial and preventing litigious investors from playing a game of "heads I win, tails you lose" with securities defendants. The effectiveness of this defense would be greatly impaired if a five-year limitations period—a period that Congress found too long in the 1933 and 1934 Acts—were applicable.

Finally, the SEC contends (Br. 17) that, because insider trading is one form of 10(b) violation, consistency requires that all 10(b) claims be subject to the insider trading limitations provision in the ITSFEA. This argument cannot be squared with Congress's manifest intent under the se-

curities laws. By its plain terms and unambiguous history, the ITSFEA was limited to the special situation of insider trading. Congress recognized that there was a broad universe of other 10(b) violations, and it could not have stated more clearly that such suits were to be left as they were, unaffected by this narrowly-focused statute. See pages 41-42, *supra*. Beyond this, the divergence between insider trading claims and other 10(b) claims will not cause confusion in practical operation, since a plaintiff under Section 20A will have to "accept the [restrictions] of that statute, including the restriction of damages to the defendants' profit (as opposed to the plaintiff's loss). In the great bulk of cases, there will be no ambiguity." *Short*, 908 F.2d at 1391.

The SEC's proposed solution also would do nothing to cure the perceived problem of inconsistency. While the SEC's approach would result in a single limitations period in 10(b) and ITSFEA insider trading cases, other suits would be subject to different limitations periods for interrelated causes of action. See *Ceres Partners*, slip op. 29-32. For example, it is common for a purchaser-plaintiff to allege fraud by a seller under both Section 12(2) of the 1933 Act (15 U.S.C. § 77*l*(2))—which is governed by the one-year/three-year limitations provision—and Section 10(b)—which the SEC would treat under the five-year limitations provision. Indeed, the SEC acknowledges (Br. 18) that 10(b) actions "now overlap[ ] in significant respects with the coverage of other express causes of action." See generally *Herman & MacLean* v. *Huddleston*, 459 U.S. 375 (1983).[32]

[32] A further anomaly in the SEC's position is that it would "allow many plaintiffs who could have sued on express private causes of action, but whose actions were barred by short limitations periods, to maintain their claims as 10b-5 suits." ABA Report at 647 n.19. See *Ernst & Ernst* v. *Hochfelder*, 425 U.S. at 210 (implied securities remedies should not be construed to "nullify the effectiveness of the carefully drawn procedural restrictions on these express actions").

In the end, the court in *Short* was exactly right in rejecting this contention of the SEC. "Congress did not say that § 20A applies to all cases under Rule 10b-5; it did not amend [the limitations provisions in the 1933 and 1934 Acts]; it limited the scope of § 20A's statute of limitations to a particular and atypical kind of violation." 908 F.2d at 1392. Accordingly, "run-of-the-mine frauds under Rule 10b-5 should be governed by the statute in force when Rule 10b-5 came into being, the statute *designed for* the kind of conduct about which * * * most * * * 10b-5 plaintiffs complain"; to borrow the ITSFEA provision "as the rule for *all* Rule 10b-5 actions, just because a five-year period has been deemed appropriate for one atypical kind of violation, would let the tail wag the dog." *Ibid.* (emphasis in original).[33]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[33] Even under the SEC's position—that 10(b) actions are subject to a five-year statute of repose—defendants Comdisco, Inc. and Kenneth N. Pontikes would be entitled to dismissal. The Fourth Amended Complaint concedes (¶ 431) that the 17 Euston Associates plaintiffs (who are the only plaintiffs against these two defendants) made their investments in May and June 1981. Because the earliest complaint of these 17 plaintiffs was filed in November 1986—more than five years after the transactions at issue—their claims plainly are time-barred.

STATUTORY AND REGULATORY APPENDIX

1. Securities Act of 1933, 15 U.S.C. § 77a *et seq.*

A. Section 11, 15 U.S.C. § 77k:

(a) In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in, the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

(b) Notwithstanding the provisions of subsection (a) no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof—

(1) that before the effective date of the part of the registration statement with respect to which his liability is asserted (A) he had resigned from or had taken such steps as are permitted by law to resign from, or ceased or refused to act in, every office, capacity, or relationship in which he was described in the registration statement as acting or agreeing to act, and (B) he had advised the Commission and the issuer in writing that he had taken such action and that he would not be responsible for such part of the registration statement; or

(2) that if such part of the registration statement became effective without his knowledge, upon becoming aware of such fact he forthwith acted and advised the Commission, in accordance with paragraph (1), and, in addition, gave reasonable public notice that such part of the registration statement had become effective without his knowledge; or

(3) that (A) as regards any part of the registration statement not purporting to be made on the authority of an expert, and not purporting to be a copy of or extract from a report or valuation of an expert, and not purporting to be made on the authority of a public official document or statement, he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading; and (B) as regards any part of the registration statement purporting to be made upon his authority as an expert or purporting to be a copy of or extract from a report or valuation of himself as an expert, (i) he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or (ii) such part of the registration statement did not fairly represent his statement as an expert or was not a fair copy of or extract from his report or valuation as an expert; and (C) as regards any part of the registration statement purporting to be made on the authority of an expert (other than himself) or purporting to be a copy of or extract from a report or valuation of an expert (other than himself), he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue or that there

was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement of the expert or was not a fair copy of or extract from the report or valuation of the expert; and (D) as regards any part of the registration statement purporting to be a statement made by an official person or purporting to be a copy of or extract from a public official document, he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue, or that there was an omission to state a material fact required to be stated therein or necessary to make the statement therein not misleading, or that such part of the registration statement did not fairly represent the statement made by the official person or was not a fair copy of or extract from the public official document.

(c) In determining, for the purpose of paragraph (3) of subsection (b) of this section, what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a prudent man in the management of his own property.

(d) If any person becomes an underwriter with respect to the security after the part of the registration statement with respect to which his liability is asserted has become effective, then for the purposes of paragraph (3) of subsection (b) of this section such part of the registration statement shall be considered as having become effective with respect to such person as of the time when he became an underwriter.

(e) The suit authorized under subsection (a) may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: Provided, that if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public. In any suit under this or any other section of this title the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the

motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

(f) All or any one or more of the persons specified in subsection (a) shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

(g) In no case shall the amount recoverable under this section exceed the price at which the security was offered to the public.

B. Section 12, 15 U.S.C. § 77*l*:

Any person who

(1) offers or sells a security in violation of section 5, or

(2) offers or sells a security (whether or not exempted by the provisions of section 3, other than paragraph (2) of subsection (a) thereof), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of

the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

C. Section 13, 15 U.S.C. § 77m:

No action shall be maintained to enforce any liability created under section 11 or section 12(2) unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 12(1), unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 11 or section 12(1) more than three years after the security was bona fide offered to the public, or under section 12(2) more than three years after the sale.

2. Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq*.

A. Section 9, 15 U.S.C. § 78i:

(a) It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of

any facility of any national securities exchange, or for any member of a national securities exchange—

(1) For the purpose of creating a false or misleading appearance of active trading in any security registered on a national securities exchange, or a false or misleading appearance with respect to the market for any such security, (A) to effect any transaction in such security which involves no change in the beneficial ownership thereof, or (B) to enter an order or orders for the purchase of such security with the knowledge that an order or orders of substantially the same size, at substantially the same time and at substantially the same price, for the sale of any such security, has been or will be entered by or for the same or different parties, or (C) to enter any order or orders for the sale of any such security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the purchase of such security, has been or will be entered by or for the same or different parties.

(2) To effect, alone or with one or more other persons, a series of transactions in any security registered on a national securities exchange creating actual or apparent active trading in such security or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others.

(3) If a dealer or broker, or other person selling or offering for sale or purchasing or offering to purchase the security, to induce the purchase or sale of any security registered on a national securities exchange by the circulation or dissemination in the ordinary

course of business of information to the effect that the price of any such security will or is likely to rise or fall because of market operations of any one or more persons conducted for the purpose of raising or depressing the prices of such security.

(4) If a dealer or broker, or other person selling or offering for sale or purchasing or offering to purchase the security, to make, regarding any security registered on a national securities exchange, for the purpose of inducing the purchase or sale of such security, any statement which was at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, and which he knew or had reasonable ground to believe was so false or misleading.

(5) For a consideration, received directly or indirectly from a dealer or broker, or other person selling or offering for sale or purchasing or offering to purchase the security, to induce the purchase or sale of any security registered on a national securities exchange by the circulation or dissemination of information to the effect that the price of any such security will or is likely to rise or fall because of the market operations of any one or more persons conducted for the purpose of raising or depressing the price of such security.

(6) To effect either alone or with one or more other persons any series of transactions for the purchase and/or sale of any security registered on a national securities exchange for the purpose of pegging, fixing, or stabilizing the price of such security in contravention of such rules and regulations as the Commission may prescribe as necessary or appro-

priate in the public interest or for the protection of investors.

(b) It shall be unlawful for any person to effect, by use of any facility of a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors—

(1) any transaction in connection with any security whereby any party to such transaction acquires any put, call, straddle, or other option or privilege of buying the security from or selling the security to another without being bound to do so; or

(2) any transaction in connection with any security with relation to which he has, directly or indirectly, any interest in any such put, call, straddle, option, or privilege; or

(3) any transaction in any security for the account of any person who he has reason to believe has, and who actually has, directly or indirectly, any interest in any such put, call straddle, option, or privilege with relation to such security.

(c) It shall be unlawful for any member of a national securities exchange directly or indirectly to endorse or guarantee the performance of any put, call, straddle, option, or privilege in relation to any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(d) The terms "put", "call", "straddle", "option", or "privilege" as used in this section shall not include any registered warrant, right, or convertible security.

(e) Any person who willfully participates in any act or transaction in violation of subsection (a), (b), or (c) of this section, shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction, and the person so injured may sue in law or in equity in any court of competent jurisdiction to recover the damages sustained as a result of any such act or transaction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant. Every person who becomes liable to make any payment under this subsection may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment. No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.

(f) The provisions of subsection (a) shall not apply to an exempted security.

(g) Notwithstanding any other provision of law, the Commission shall have the authority to regulate the trading of any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency (but not, with respect to any of the foregoing, an option on a contract for future delivery).

B. Section 10, 15 U.S.C. § 78j:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumen-

tality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

C. Section 16, 15 U.S.C. § 78p:

(a) Every person who is directly or indirectly the beneficial owner of more than 10 per centum of any class of any equity security (other than an exempted security) which is registered pursuant to section 12 of this title, or who is a director or an officer of the issuer of such security, shall file, at the time of the registration of such security on a national securities exchange or by the effective date of a registration statement filed pursuant to section 12(g) of this title, or within ten days after he becomes such beneficial owner, director, or officer, a statement with the Commission (and, if such security is registered on a national securities exchange, also with the exchange) of the amount of all equity securities of such issuer of which he is the beneficial owner, and within ten days after the close of each calendar month thereafter, if

there has been a change in such ownership during such month, shall file with the Commission (and if such security is registered on a national securities exchange, shall also file with the exchange) a statement indicating his ownership at the close of the calendar month and such changes in his ownership as have occurred during such calendar month.

(b) For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection.

(c) It shall be unlawful for any such beneficial owner, director, or officer, directly or indirectly, to sell any equity security of such issuer (other than an exempted security), if the person selling the security or his principal (1) does not own the security sold, or (2) if owning the security, does not deliver it against such sale within twenty days thereafter, or does not within five days after such sale deposit it in the mails or other usual channels of transportation; but no person shall be deemed to have violated this subsection if he proves that notwithstanding the exercise of good faith he was unable to make such delivery or deposit within such time, or that to do so would cause undue inconvenience or expense.

(d) The provisions of subsection (b) of this section shall not apply to any purchase and sale, or sale and purchase, and the provisions of subsection (c) of this section shall not apply to any sale, of an equity security not then or theretofore held by him in an investment account, by a dealer in the ordinary course of his business and incident to the establishment or maintenance by him of a primary or secondary market (otherwise than on a national securities exchange or an exchange exempted from registration under section 5 of this title) for such security. The Commission may, by such rules and regulations as it deems necessary or appropriate in the public interest, define and prescribe terms and conditions with respect to securities held in an investment account and transactions made in the ordinary course of business and incident to the establishment or maintenance of a primary or secondary market.

(e) The provisions of this section shall not apply to foreign or domestic arbitrage transactions unless made in contravention of such rules and regulations as the Commission may adopt in order to carry out the purposes of this section.'

D. Section 18, 15 U.S.C. § 78r:

(a) Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to this title or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 15 of this title, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading. A person seeking to enforce such liability may sue at law or in equity in any court of competent jurisdiction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant.

(b) Every person who becomes liable to make payment under this section may recover contribution as in cases of contact from any person who, if joined in the original suit, would have been liable to make the same payment.

(c) No action shall be maintained to enforce any liability created under this section unless brought within one year after the discovery of the facts constituting the cause of action and within three years after such cause of action accrued.

E. Section 29, 15 U.S.C. § 78cc:

(a) Any condition, stipulation, or provision binding any person to waive compliance with any pro-

vision of this title or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.

(b) Every contract made in violation of any provision of this title or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this title or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, or regulation: *Provided,* (A) That no contract shall be void by reason of this subsection because of any violation of any rule or regulation prescribed pursuant to paragraph (2) or (3) of subsection (c) of section 15 of this title, and (B) that no contract shall be deemed to be void by reason of this subsection in any action maintained in reliance upon this subsection, by any person to or for whom any broker or dealer sells, or from or for whom any broker or dealer purchases, a security in violation of any rule or regulation prescribed pursuant to paragraph (1) of subsection (c) of section 15 of this title, unless such action is brought within one year after the discovery that such sale or purchase involves such violation and within three years after such violation.

(c) Nothing in this title shall be construed (1) to affect the validity of any loan or extension of credit (or any extension or renewal thereof) made

or of any lien created prior or subsequent to the enactment of this title, unless at the time of the making of such loan or extension of credit (or extension or renewal thereof) or the creating of such lien, the person making such loan or extension of credit (or extension or renewal thereof) or acquiring such lien shall have actual knowledge of facts by reason of which the making of such loan or extension of credit (or extension or renewal thereof) or the acquisition of such lien is a violation of the provisions of this title or any rule or regulation thereunder, or (2) to afford a defense to the collection of any debt or obligation or the enforcement of any lien by any person who shall have acquired such debt, obligation, or lien in good faith for value and without actual knowledge of the violation of any provision of this title or any rule or regulation thereunder affecting the legality of such debt, obligation, or lien.

3. Insider Trading Sanctions Act of 1984, adding Section 21(d)(2) of the Securities Exchange Act of 1934, 15 U.S.C. § 78u(d)(2) (Supp. IV 1986), as amended and recodified, Section 21A of the Securities Exchange Act of 1934, 15 U.S.C. § 78u-1 (1988):

(a) Authority to impose civil penalties

(1) Judicial actions by Commission authorized

Whenever it shall appear to the Commission that any person has violated any provision of this chapter or the rules or regulations thereunder by purchasing or selling a security while in possession of material, nonpublic information in, or has violated any such provision by communicating such information in connection with, a transaction on or through the facilities of a national securities exchange or from or through a broker or dealer, and which is not part of a public offering by an issuer of securities other than standardized options, the Commission—

(A) may bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, a civil penalty to be paid by the person who committed such violation; and

(B) may, subject to subsection (b)(1) of this section, bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, a civil penalty to be paid by a person who, at the time of the violation, directly or indirectly controlled the person who committed such violation.

(2) Amount of penalty for person who committed violation

The amount of the penalty which may be imposed on the person who committed such violation shall be determined by the court in light of the facts and circumstances, but shall not exceed three times the profit gained or loss avoided as a result of such unlawful purchase, sale, or communication.

(3) Amount of penalty for controlling person

The amount of the penalty which may be imposed on any person who, at the time of the violation, directly or indirectly controlled the person who committed such violation, shall be determined by the court in light of the facts and circumstances, but shall not exceed the greater of $1,000,000, or three times the amount of the profit gained or loss avoided as a result of such controlled person's violation. If such controlled person's violation was a violation by communication, the profit gained or loss avoided as a result of the violation shall, for purposes of this paragraph only, be deemed to be limited to the profit gained or loss avoided by the person or persons to whom the controlled person directed such communication.

(b) Limitations on liability

(1) Liability of controlling persons

No controlling person shall be subject to a penalty under subsection (a)(1)(B) of this section unless the Commission establishes that—

(A) such controlling person knew or recklessly disregarded the fact that such controlled person was likely to engage in the act or acts constituting the violation and failed to take appropriate steps to prevent such act or acts before they occurred; or

(B) such controlling person knowingly or recklessly failed to establish, maintain, or enforce any policy or procedure required under section 78*o*(f) of this title or section 80b-4a of this title and such failure substantially contributed to or permitted the occurrence of the act or acts constituting the violation.

(2) Additional restrictions on liability

No person shall be subject to a penalty under subsection (a) of this section solely by reason of employing another person who is subject to a penalty under such subsection, unless such employing person is liable as a controlling person under paragraph (1) of this subsection. Section 78t(a) of this title shall not apply to actions under subsection (a) of this section.

(c) Authority of Commission

The Commission, by such rules, regulations, and orders as it considers necessary or appropriate in the public interest or for the protection of investors, may exempt, in whole or in part, either unconditionally or upon specific terms and conditions, any person or transaction or class of persons or transactions from this section.

(d) Procedures for collection

(1) Payment of penalty to Treasury

A penalty imposed under this section shall (subject to subsection (e) of this Section) be payable into the Treasury of the United States.

(2) Collection of penalties

If a person upon whom such a penalty is imposed shall fail to pay such penalty within the time prescribed in the court's order, the Commission may refer the matter to the Attorney General who shall recover such penalty by action in the appropriate United States district court.

(3) Remedy not exclusive

The actions authorized by this section may be brought in addition to any other actions that the Commission or the Attorney General are entitled to bring.

(4) Jurisdiction and venue

For purposes of section 78aa of this title, actions under this section shall be actions to enforce a liability or a duty created by this chapter.

(5) Statute of limitations

No action may be brought under this section more than 5 years after the date of the purchase or sale. This section shall not be construed to bar or limit in any manner any action by the Commission or the Attorney General under any other provision of this chapter, nor shall it bar or limit in any manner any action to recover penalties, or to seek any other order regarding penalties, imposed in an action commenced within 5 years of such transaction.

(e) Authority to award bounties to informants

Notwithstanding the provisions of subsection (d)(1) of this Section, there shall be paid from amounts im-

posed as a penalty under this section and recovered by the Commission or the Attorney General, such sums, not to exceed 10 percent of such amounts, as the Commission deems appropriate, to the person or persons who provide information leading to the imposition of such penalty. Any determinations under this subsection, including whether, to whom, or in what amount to make payments, shall be in the sole discretion of the Commission, except that no such payment shall be made to any member, officer, or employee of any appropriate regulatory agency, the Department of Justice, or a self-regulatory organization. Any such determination shall be final and not subject to judicial review.

(f) Definition

For purposes of this section, "profit gained" or "loss avoided" is the difference between the purchase or sale price of the security and the value of that security as measured by the trading price of the security a reasonable period after public dissemination of the nonpublic information.

4. Insider Trading and Securities Fraud Enforcement Act of 1988, adding Section 20A of the Securities Exchange Act of 1934, 15 U.S.C. § 78t-1:

(a) Private rights of action based on contemporaneous trading

Any person who violates any provision of this chapter or the rules or regulations thereunder by purchasing or selling a security while in possession of material, nonpublic information shall be liable in an action in any court of competent jurisdiction to any person who, contemporaneously with the purchase or sale of securities that is the subject of such violation, has purchased (where such violation is based on a sale of securities) or sold (where such violation is based on a purchase of securities) securities of the same class.

(b) Limitations on liability

(1) Contemporaneous trading actions limited to profit gained or loss avoided

The total amount of damages imposed under subsection (a) shall not exceed the profit gained or loss avoided in the transaction or transactions that are the subject of the violation.

(2) Offsetting disgorgements against liability

The total amount of damages imposed against any person under subsection (a) shall be diminished by the amounts, if any, that such person may be required to disgorge, pursuant to a court order obtained at the instance of the Commission, in a proceeding brought under section 78u(d) of this title relating to the same transaction or transactions.

(3) Controlling person liability

No person shall be liable under this section solely by reason of employing another person who is liable under this section, but the liability of a controlling person under this section shall be subject to section 78t(a) of this title.

(4) Statute of limitations

No action may be brought under this section more than 5 years after the date of the last transaction that is the subject of the violation.

(c) Joint and several liability for communicating

Any person who violates any provision of this title or the rules or regulations thereunder by communicating material, nonpublic information shall be jointly and severally liable under subsection (a) of this Section with, and to the same extent as, any person or persons liable under subsection (a) to whom the communication was directed.

(d) Authority not to restrict other express or implied rights of action

Nothing in this section shall be construed to limit or condition the right of any person to bring an action to enforce a requirement of this chapter or the availability of any cause of action implied from a provision of this chapter.

(e) Provisions not to affect public prosecutions

This section shall not be construed to bar or limit in any manner any action by the Commission or the Attorney General under any other provision of this chapter, nor shall it bar or limit in any manner any action to recover penalties, or to seek any other order regarding penalties.

5. SEC Rule 10b-5, 17 C.F.R. § 240.10b-5:

Employment of Manipulative and Deceptive Devices. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.